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**QUESTION PRESENTED**

In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo*?

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1991

No. 91-542

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,  
*Petitioner,*

vs.

FRANK ROBERT WEST, JR.,  
*Respondent.*

INTEREST OF AMICUS CURIAE<sup>1</sup>

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. During the past decade, that dedication has led the ABA to make habeas corpus one of its highest priorities. In 1982, the Association adopted a comprehensive policy urging specific reforms in federal and state postconviction procedures. In 1983 and 1991, the ABA provided testimony and written materials to both Houses of Congress considering reform of the habeas corpus statutes.

The ABA has been particularly concerned with the administration of justice in habeas corpus proceedings brought by prisoners sentenced to death in state courts. In 1989, under a grant from the State Justice Institute, an ABA task force conducted an intensive study of death penalty habeas corpus reform. Based upon the task force's report and recommendations, the ABA in 1990 adopted, by overwhelming vote, a comprehensive policy statement

<sup>1</sup> Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

which urged legislative reform of habeas corpus procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many postconviction petitions raise. No organization in this country is more aware of the need for reform of habeas corpus procedures than the ABA, and none has worked harder during the past decade to achieve that reform.

### SUMMARY OF ARGUMENT

The issue posed by the Court is not one of constitutional law or judicial administration, which this Court can settle as it deems best. It is Congress, not this Court, that defines both the jurisdiction of the federal courts in habeas proceedings and the nature of the review to be exercised in those proceedings. This crucial point is overlooked by both the petitioners and the Solicitor General, who do not even assess the most relevant materials in answering the question posed: *Congress'* pronouncements on habeas corpus. To vary a well-known maxim, it is, after all, a *statute* we are expounding. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Congress has been extraordinarily consistent on the question posed by the Court. Whenever it has granted federal rights to prisoners in state custody, Congress has given federal courts plenary power, in habeas proceedings, to re-examine independently the substance of state court decisions to ensure that those federal rights were respected. Decisions applying the Habeas Corpus Acts of 1833 and 1842 confirm that when federal courts were authorized to entertain habeas petitions from state prisoners, they paid no deference at all to the underlying state-court determinations. When the Civil War amendments enlarged the federal rights of state prisoners, Congress promptly in 1867 expanded the federal courts' habeas jurisdiction to protect these new federal rights. Given the Reconstruction Congress' undeniable preference for a federal forum to enforce the newly granted federal rights, it would be remarkable indeed if Congress had intended federal courts

to defer to state courts' interpretations or applications of federal law.

In *Brown v. Allen*, 344 U.S. 443 (1953), this Court made explicit what the federal courts had understood for decades: when adjudicating cases under the 1867 habeas corpus statute, federal courts were to exercise independent, plenary review of state-court conclusions of federal law and mixed questions of law and fact. While *Brown* spawned academic debate, its affirmation of the standard of review called for by Congress the 1867 Act has been accepted and followed for almost forty years.

Since *Brown*, Congress has considered reforming the habeas system at least 21 times and has twice enacted substantive amendments. Well aware of *Brown's* interpretation of the 1867 Act, Congress has explicitly considered, and rejected, legislation designed to overrule the standard of independent review. In short, the Solicitor General and other *amici* supporting petitioners are attempting to get this Court to do something they have been unable to convince the democratically elected Congress to do. It would be an aggressive exercise of judicial power for the Court to reinterpret the 1867 Act today simply because it believes that the policies of habeas corpus might thereby be better served. Considerations of *stare decisis* apply most strongly in this statutory context, for if *Brown* was wrong, Congress could have—and still can—correct it.

Contrary to the arguments of the petitioners and the Solicitor General, this Court's recent decisions have not changed the independent review standard. *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny merely establish that new rules of constitutional law announced after a conviction becomes final should not be applied in federal habeas proceedings. Far from requiring federal courts to defer to state courts' interpretations of settled constitutional law so long as they are merely "reasonable," *Teague* insists that, once it is determined what the law was at the time of the state-court decision, federal courts must ensure that that law be applied faithfully. Since deciding *Teague*, this

Court has continued to apply independent, plenary review under the 1867 Act to state-court applications of federal constitutional law.

Indeed, after *Teague*, there remains no federalism-based reason to defer to state-court applications of constitutional law. Before *Teague*, state courts were often reversed on habeas for failing to anticipate this Court's evolving views about due process. Now, decisions of state courts are reviewed only to determine if they were correct at the time they were rendered. If state courts are truly co-equal, there is no reason for federal courts to defer to them when they were wrong at the time of decision, even if they were only "reasonably" wrong. Moreover, adding a rule of deference after *Teague* would gratuitously undercut three of the most important functions of federal habeas review: (1) "to determine that the conviction rests upon correct application of the law in effect at the time of the conviction;" (2) "to force trial and appellate courts . . . to toe the constitutional mark," *Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J. concurring); and (3) to ensure that the Constitution is applied equally in all jurisdictions.

The primary reason Congress has never strayed from independent, plenary review is undoubtedly the crucial role that review has played in safeguarding constitutional rights. Recent studies reveal that in four out of every ten capital cases in which the state courts have found no constitutional defect, federal courts, exercising plenary, independent review, have been compelled to grant the writ because of constitutional error. It is impossible to imagine how that record could recommend deference.

It is fundamentally wrong to ask federal judges to affirm incorrect but "reasonable" decisions of state courts. A federal judge who concludes that settled constitutional rights were violated should not then ask himself whether the state court's mistake in rejecting the claim was "reasonable." Affirming rulings which, however reasonable, incorrectly apply the Constitution accords with neither the judicial oath to uphold the Constitution nor the congress-

sional mandate to "entertain" all claims that a prisoner is being restrained in violation of his constitutional rights.

## ARGUMENT

### Introduction

In November 1919 five black men were sentenced to death following a forty-five minute trial in an Arkansas courtroom inflamed by community passion. The state supreme court answered the defendants' claim they had been denied a fair trial by stating "'that it could not say 'that this must necessarily have been the case;' that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient.'" *Moore v. Dempsey*, 261 U.S. 86, 91 (1923). The federal district court refused to consider a petition for writ of habeas corpus, on the grounds that the Arkansas state courts had considered the petitioners' due process claims.

On appeal this Court reversed. Speaking for the Court, Justice Holmes stated "that it does not seem to us sufficient to allow a judge of the United States to escape the duty" of independently evaluating the constitutional significance of the facts "when, if true, as alleged, they make the trial absolutely void." *Id.* at 92. Thus were the lives of five men saved, and the importance of independent federal habeas review of the application of constitutional law underscored—as it has been so many times in our nation's history.

The facts of the case now before the Court pale in comparison to *Moore v. Dempsey*, but the question posed by this Court raises the same fundamental question answered 69 years ago by Justice Holmes. The ABA urges this Court to adhere to the answer it has consistently given in the past: In determining whether to grant a petition for a writ of habeas corpus by a person in state custody, a federal court must exercise plenary, independent review of all questions of federal constitutional law properly pre-

sented. This is the standard of review that has been dictated by Congress, and applied by this Court, since 1789.

This standard of review must apply regardless of whether the constitutional issues raised are "pure" questions of law or "mixed" questions of law and fact. In the latter, the federal court defers to state-court findings of fact, as required by Congress in 28 U.S.C. § 2254(d). But on the application of federal constitutional principles to those facts, the federal court must exercise independent judgment upon plenary review. See, e.g., *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981). The court must consider the views of "a coequal state judiciary", *Miller v. Fenton*, 474 U.S. 104, 112 (1985), but it cannot "defer" to those views simply because they are "reasonable" and resulted from a "full and fair" hearing. As Justice Frankfurter explained in *Brown v. Allen*, 344 U.S. at 508 (emphasis added), Congress demands more:

Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of [constitutional] issues, no binding weight is to be attached to the State determination. *The congressional requirement is greater.* The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

**I. In Habeas Proceedings Involving State Prisoners, Congress Has Mandated Plenary, Independent Review of All Constitutional Questions Properly Presented.**

The Great Writ of habeas corpus, whose protections were "[c]onsidered by the Founders as the highest safeguard of liberty," *Smith v. Bennett*, 365 U.S. 708, 712 (1961), is "provided for, in the most ample manner" in the United States Constitution, *The Federalist* No. 83, at 543 (Luce ed. 1976). Article I, section 9 guarantees against suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it."

Yet the power of federal courts to issue the writ is neither inherent nor dictated by the Constitution. Rather, it is a power which Congress must confer by statute. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). And except to insist that "the writ of *habeas corpus* is the precious safeguard of personal liberty and [that] there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), this Court has generally left to Congress the implementation of the Suspension Clause's requirement that the writ be preserved. This is consistent with the constitutional scheme: significantly, the Suspension Clause is included in article I, prescribing the powers of Congress, not article III.

In particular, this Court has recognized that delineating the jurisdiction and standard of review of federal courts in habeas corpus cases is for Congress, whether or not in particular instances this Court agrees with the wisdom of that delineation. Justice Frankfurter put it thus (*Brown v. Allen*, 344 U.S. at 499):

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. . . . It is not for us to determine whether this power should have been vested in the federal courts. As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of [the Act of 1867], "although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus*, there seems to be no escape from the law." *Ex parte Bridges*, 2 Woods (5th Cir.) 428, 432.

*Accord*, e.g., *id.* at 460 (Reed, J.); *Ex parte Royall*, 117 U.S. 241, 253 (1886); *Miller v. Fenton*, 474 U.S. at 112.

**A. Congress Has Always Insisted on Plenary Federal Habeas Review for All Federal Rights of State Prisoners.**

Since 1789, Congress' mandate concerning habeas corpus has been unequivocal. For every federal right available

to persons incarcerated pursuant to public authority, Congress has insisted upon a full, meaningful remedy in federal court for violations of that right.

### 1. Federal Habeas Corpus Prior to the Civil War

One of the earliest acts of the First Congress was its creation of the federal judiciary and delineation of some of the rights of persons in custody pursuant to federal authority. See Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81-82. At the very same time, Congress created a federal habeas corpus remedy for violations of those rights and made that remedy available to all prisoners "in custody, under or by colour of the authority of the United States." *Id.* While the habeas corpus powers of federal courts extended only to federal prisoners, so too did the Bill of Rights and other federal protections. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Peters) 243 (1833). State prisoners simply had no federal rights.

It was not long before Congress began affording substantive rights to certain classes of persons incarcerated by the states. In each instance, it accompanied its grant of rights with a coextensive federal habeas remedy for violations of those rights. Thus, in 1833 Congress empowered federal courts to entertain habeas petitions from state prisoners claiming to have acted under federal law. See Act of March 2, 1833, ch. 57 § 7, 4 Stat. 634. At the time, there was no doubt that federal authorization could have been raised as a defense to any prosecution in state court. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Nevertheless, Congress obliged federal courts in habeas proceedings to re-examine these federal defenses.

In 1842 Congress again extended federal rights to a class of persons in state custody—this time to foreign nationals held on account of an act claimed to have been done under color of foreign authority. See Act of Aug. 29, 1842, ch. 257, 5 Stat. 539. And again it legislated enforcement of these federal rights by authorizing federal courts to grant writs of habeas corpus to state prisoners

protected by the Act. See *In re Neagle*, 135 U.S. 1, 71-72, 74 (1890).

Under both Acts, the federal courts clearly understood that their review was to be *de novo*. As one court explained, anything less would allow "a law of the United States [to] be evaded and set at naught . . . by the specious pretences of law." *Ex parte Sifford*, 22 F. Cas. 105, 112 (C.C.S.D. Ohio 1857) (No. 12,848). When presented with petitions for writs of habeas corpus, federal courts routinely reviewed state-court legal determinations *de novo*. See, e.g., *Ex parte Robinson*, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934); *Ex parte Jenkins*, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259); *United States ex rel. Garland v. Morris*, 26 F. Cas. 1318 (C.C.D. Wis. 1854) (No. 15,811).

### 2. The Fourteenth Amendment and the Civil War Statutes

The Civil War revolutionized the relationship between the states and the federal government. Nowhere did this change manifest itself more than in the massive expansion of federal civil rights and their application in state proceedings. And as federal rights grew, so too did the habeas corpus remedy to protect them in federal courts if state courts did not. When the fourteenth amendment, along with a number of civil rights statutes, extended federal protections to all state prisoners, Congress immediately gave "the several courts of the United States . . . power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

The legislative history of the 1867 Act is sparse but unambiguous. Congress proclaimed its intention to make habeas corpus a bill of the largest liberty, available to "enforce the liberty of all persons," *Cong. Globe*, 39th Cong., 1st Sess. 4151 (1866) (Rep. Lawrence). As Senator Trumbull succinctly described the relationship between the new fourteenth amendment rights and Congress' simul-

taneous extension of the habeas corpus remedy (*Cong. Globe*, 39th Cong., 1st Sess. 4229 (1866)):

Now a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have . . . the benefit of the writ . . . [and] recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

This Court clearly and promptly recognized the scope of the federal courts' power to review the adjudication by state courts of the newly enacted federal rights. One year after passage, Justice Chase, speaking for a unanimous court, explained (*Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 321-322 (1868)):

This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

In *Ex parte Royall*, 117 U.S. 241, 247 (1886), the Court similarly stated that "[t]he grant . . . of jurisdiction to issue writs of *habeas corpus* is in language as broad as could well be employed". See also *id.* at 253 (citing *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875)).

The 1867 Act does not state explicitly that federal review of state-court determinations of constitutional law must be plenary and independent. But neither, for that matter, has Congress ever said expressly that this Court's review of constitutional questions, even in cases arising from the federal courts, shall be *de novo*. In both contexts it is fundamental to Congress' scheme that review be plenary. Given the Reconstruction Congress' manifest distrust of the southern states' willingness to vindicate the new federal civil rights, there is simply no doubt that it contemplated plenary review by the federal courts. See, e.g., Wiecek, *The Reconstruction of Federal Judicial Power*,

1863-1875, 13 Am. J. Legal Hist. 333, 338, 342-43 (1969).<sup>2</sup> As then ABA-president Seymour D. Thompson reflected in a contemporary annotation, 18 F. 68, 81 (1883)):

The act of 1867 . . . extended the writ to all cases where the prisoner, though held under state process, might in the opinion of the federal court or judge issuing the writ, be held in violation of the constitution, or of any treaty or law of the United States.

### 3. Recodifications of the 1867 Act

Reconstruction, of course, has long since passed. In the ensuing century, Congress substantively revised the habeas corpus statute no less than *nine* times.<sup>3</sup> It has considered proposed habeas corpus legislation in every Congress but one since 1948 and has held at least thirteen sets of hearings on habeas reform since 1955.<sup>4</sup> Yet throughout—and notwithstanding the great changes this country has seen in the relation of the states to the federal government

<sup>2</sup> This Court has frequently invoked the legislative history of 42 U.S.C. § 1983 as evidence that the Reconstruction Congress intended to ensure access to federal courts to vindicate federal rights. See, e.g., *Felder v. Casey*, 487 U.S. 131, 147 (1988); *Patsy v. Board of Regents*, 457 U.S. 496, 503, 506-07 (1982); see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66-67 (1989). Interpreting the 1867 Act to mandate deference to state-court applications of the federal constitution would therefore rest on a counterintuitive assumption: that the Reconstruction Congress deemed federal court access to be less important for those people unconstitutionally confined by the states than for those seeking money damages under § 1983.

<sup>3</sup> Act of March 27, 1868, 15 Stat. 44 (withdrawing Supreme Court appellate jurisdiction in habeas cases); Act of March 3, 1885, 28 Stat. 437 (restoring Supreme Court jurisdiction); Act of March 8, 1908, 35 Stat. 40 (certificates of probable cause); Act of Feb. 13, 1925, 43 Stat. 936 (habeas appeals); Act of June 25, 1948, 62 Stat. 964 (revision of Title 28); Act of May 24, 1949, 63 Stat. 105 (authority of individual justices to grant writ); Act of Sept. 19, 1966, Pub. L. No. 89-711, 80 Stat. 1105 (requiring deference to state court findings of fact); Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (ratifying, with modifications, the Rules Governing § 2254 Cases).

<sup>4</sup> Citations to the above-referenced proposals and hearings are collected in the Brief for Senator Biden and Representative Edwards as *amici curiae* in Support of Respondent.

and the successive efforts to convince Congress to limit the breadth of federal habeas corpus—particularly as applied to state prisoners—the broad mandate of the habeas statute has not materially changed.<sup>5</sup> Acting against the backdrop of this Court's decisions, Congress has successively recodified the habeas statute without limiting in any way the plenary review conducted by federal courts of all questions of federal constitutional law. Only last Term this Court confirmed that "the writ today . . . extend[s] to *all* dispositive constitutional claims presented in a proper procedural manner." *McCleskey v. Zant*, 111 S. Ct. 1454, 1462 (1991) (emphasis added).

### B. Federal Courts Have Never Deferred to State Courts' Application of Constitutional Law.

While the 1867 Act, combined with passage of the fourteenth amendment and the subsequent expansion of procedural due process, vastly enlarged the *quantity* of federal rights state prisoners could raise on habeas, the *quality* of review mandated by Congress has never changed. Reflecting Congress' broad and unequivocal grant, federal courts have never deferred to state-court determinations or applications of federal law.

#### 1. Review Prior to *Brown v. Allen*

For over fifty years following ratification of the fourteenth amendment, "due process" extended, at least ostensibly, only to the assurance that the state court had properly exercised "jurisdiction" over the defendant. *See, e.g., In re Juiro*, 140 U.S. 291 (1891). Even at that time,

<sup>5</sup> Proposals to narrow the scope of federal habeas corpus review of state proceedings were before Congress during its 1884, 1908, 1925, 1945-48, 1955-59, 1961-66, 1968, 1971-73, 1981-82, 1985, and 1988-91 sessions, and on each occasion Congress chose to retain the basic structure, although sometimes imposing procedural restraints. (Proposals prior to 1945 are discussed, *e.g.*, in H.R. Rep. 730, 48th Cong., 1st Sess. 5-6 (1884) and Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307 (1983); later proposals are discussed in the briefs filed by *amici curiae* Biden *et al.*, Civiletti *et al.*, and Gunther *et al.*)

however, federal courts reviewed claims that a state proceeding violated a defendant's fundamental rights on the theory that a judgment in such a case was "void" or beyond the jurisdiction of the state court to enter. *See, e.g., Nielsen, Petitioner*, 131 U.S. 176 (1889); *In re Snow*, 120 U.S. 274 (1887). And whenever federal courts had before them habeas corpus petitions raising a recognized constitutional claim by a state prisoner, they never deferred to rulings of federal law made by the state courts.

For example, in *In re Wong Yung Quy*, 6 Sawyer 237 (C.C.D. Ca. 1880), the state argued that because its courts had jurisdiction to determine the constitutionality of the state statute in question, their judgment upholding its constitutionality was conclusive in a federal habeas proceeding. The federal court disagreed (*id.* at 239 (emphasis added)):

[I]t seems clear that the writ may issue and the prisoner be discharged whenever he is "in custody in violation of the constitution or of a law or treaty of the United States." In this case . . . whether he is in custody in violation of the constitution or treaty is *the very question to be investigated.*

*See also United States ex rel. Spink*, 19 F. 631 (C.C.E.D. La. 1884) ("[a]s the question in controversy is one as to the proper construction of the laws of the United States and of their force and effect, we feel bound to follow the adjudicated cases of our court, rather than the opinion of a state court"); *In re Ah Lee*, 6 Sawyer 410 (D. Or. 1880); *Ex parte Bridges*, 2 Woods 428 (5th Cir. 1875).

When it regained appellate jurisdiction in 1886, this Court similarly applied its own plenary review to issues of constitutional law previously adjudicated by the state courts. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *In re Snow*, 120 U.S. 274 (1887); *Nielsen, Petitioner, supra*; *In re Rahrer*, 140 U.S. 545 (1891); *Crowley v. Christensen*, 137 U.S. 86 (1890); *McElvaine v. Brush*, 142 U.S. 155 (1891). In those instances in which this Court deferred to a state-court determination that it had properly exer-

cised jurisdiction over the petitioner, the Court did so because the issue of a state court's jurisdiction was (and is) one of state law, to which federal courts must defer. *Cf. Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).<sup>6</sup>

The precise contours of the traditional deference federal courts have paid to state-court findings of fact animated the debate between Justices Pitney and Holmes in the famous case of *Frank v. Mangum*, 237 U.S. 309 (1915). Leo Frank contended that his murder conviction was constitutionally tainted because his entire trial had been dominated by a mob. Both sides agreed that the facts set forth in the petition, if "taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict." *Id.* at 332. Neither side questioned the Court's duty to review *de novo* whether or not the facts established a constitutional violation.

The majority concluded, however, that the Georgia Supreme Court, acting in an environment free from any mob influence, had found the *facts* to be not as pleaded in Frank's petition (*id.* at 333):

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<sup>6</sup> Thus, for example, in *Felts v. Murphy*, 201 U.S. 123 (1906), the issue for the Court on habeas corpus was whether petitioner's state murder trial violated due process when, notwithstanding his near-total deafness, the court declined to provide him with the means to hear the proceedings. The Court determined, without reference to any conclusions by the state court, that while the trial court's failure was "to be regretted", it was not sufficiently grave "so as to violate the provisions of the 14th Amendment to the Federal Constitution." *Id.* at 130, 129. As to the state court's jurisdiction otherwise over the case, the Court treated that as a matter of fact properly found by the state court. See also *In re Converse*, 137 U.S. 624 (1891).

Contrary to the assertion made by *amicus* Criminal Justice Legal Foundation (Br. at 8-9), *In re Wood*, 140 U.S. 278 (1891), does not establish that, under the 1867 Act, federal courts were not empowered to exercise *de novo* review so long as the state court had jurisdiction. The claim in *Wood* was that the jurors had been selected discriminatorily—a question the Court viewed, at the time (prior to *Moore v. Dempsey*, 261 U.S. 86 (1923)), as one of *fact*, to which deference was properly due. See p. 15 *infra*. *Wood* in no way suggests that the Court would not review state-court conclusions of non-factual issues *de novo*, as *Converse* and *Felts* prove.

[T]he allegations of disorder were found by both of the state courts to be groundless except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to the defendant, and therefore insufficient in law to avoid the verdict.

The Court then opined that while these findings of fact by the Georgia courts could not be deemed "conclusively determined against the prisoner by the decision of the state court of last resort," at the same time they also "cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the matter; certainly until some reasonable ground is shown" for concluding otherwise, which the majority of this Court did not find. *Id.* at 334, 336. Deferring to the state court's finding that no mob domination occurred, the majority concluded that due process had not been violated.

Justice Holmes, in dissent, argued that the issue was not simply one of deference to a state court's findings of historical fact: "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts." *Id.* at 347. In other words, in Justice Holmes' view, the question of mob domination was what has come to be understood as a "mixed question" of law and fact, requiring the same independent plenary review as "pure" questions of law. Eight years later in a strikingly similar case, *Moore v. Dempsey*, 261 U.S. 86 (1923), the majority adopted Justice Holmes' view.

As due process was broadened to impose independent federal standards by which to judge state proceedings, it became well-established that federal habeas courts should defer to state courts on the historical facts—but not on the application of constitutional law to those facts. Thus, for example, in *Hawk v. Olsen*, 326 U.S. 271, 276 (1945), where the Court held that due process is violated "when a defendant is forced by the state to trial in such a way as to deprive him the effective assistance of counsel,"

Justice Reed, presaging his later opinion in *Brown v. Allen*, wrote (*id.* citations omitted; emphasis added):

When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. . . . *When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings.*

Similarly, in *Wade v. Mayo*, 334 U.S. 672 (1948), this Court ordered the release of a state prisoner because it concluded that the state court's refusal to provide counsel at arraignment violated due process, regardless of what the state law provided. In so holding, the Court gave no deference whatsoever to the contrary conclusion of the state trial and appellate courts on the same point.<sup>7</sup>

<sup>7</sup> These holdings in *Hawk v. Olsen* and *Wade* reveal the error by *amicus* Criminal Justice Legal Foundation (Br. at 12-13) in relying upon *dicta* in *Ex parte Hawk*, 321 U.S. 114 (1944), for the proposition that federal courts must defer to prior state-court rulings on federal constitutional law where the Supreme Court, upon a petition for writ of certiorari following direct appeal, "has either reviewed or declined to review the state court's decision." *Id.* at 118. The basis for this earlier *dicta* was: (1) the contemporary understanding that denial of a petition for a writ of certiorari constituted an "adjudication" of the legal questions raised, *see, e.g., White v. Ragen*, 324 U.S. 760, 764-65 (1945) (cited in *Brown v. Allen*, 344 U.S. at 456), and (2) the recognized principle, reflected in *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889); *Salinger v. Loisel*, 265 U.S. 224 (1924); and *Wong Doo v. United States*, 265 U.S. 239 (1924), that when a question has been adjudicated once by a federal court, subsequent review of the same question will apply a deferential "law and justice" standard. While this latter principle applies to this day, (*see* Rules Governing Section 2254 Cases in the United States District Courts, 9(b)), the former was discarded forever in *Brown v. Allen*. The *dicta* in *Ex parte Hawk*, therefore, retains vitality only to the extent this Court (or any other federal court) actually adjudicated the questions presented in a habeas petition in an earlier proceeding. *See* 28 U.S.C. § 2254(c). In all other instances, the clear holdings of *Hawk v. Olsen* and *Wade v. Mayo* govern.

## 2. *Brown v. Allen* and Its Progeny

In *Brown v. Allen* this Court made explicit the standard of review it had been applying for decades.<sup>8</sup> Writing for the Court, Justice Reed stated that in all matters relating to a constitutional claim other than determining the underlying facts, "the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues." 344 U.S. at 458. Justice Frankfurter, writing a second opinion for the Court, explained more fully (*id.* at 506-08):<sup>9</sup>

State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide. . . .

Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.

The Court's decision in *Brown* fueled scholarly debate and prompted calls upon Congress to narrow the scope of federal review. But as to the issue raised by the Court in this case—whether a federal court in habeas corpus should

<sup>8</sup> *See, e.g., Hart, Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 108-14 (1959); Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 Ohio St. L.J. 367, 382 (1983).

<sup>9</sup> Petitioners' suggestion (Br. at 11-12 n.5) that Justice Frankfurter's opinion in *Brown* does not represent the views of the Court ignores Justice Frankfurter's unequivocal statement to the contrary, 344 U.S. at 497, and the silence of the remaining eight Justices in the face of his assertion. It also contradicts the widespread recognition of that opinion as speaking for the Court. *See, e.g., Fay v. Noia*, 372 U.S. 391, 461 (1963) (Harlan, J., dissenting); *Wainwright v. Sykes*, 433 U.S. 72, 79, 87 (1977); Hart, *supra*, at 106 & n.64.

"give deference to the state court's application of law to the specific facts of the petitioner's case"—three salient facts are not subject to legitimate debate.

*First*, it is plain from both opinions of the Court that the eight-justice majority understood its holding to reflect not a rule of judicial administration, but rather a matter "controlled by statute." 344 U.S. at 460 (Reed, J.); *id.* at 499-501 (Frankfurter, J.).<sup>10</sup> What is most striking about the *amicus* brief submitted by the Solicitor General is the failure even to *mention* Congress, much less acknowledge the pervasive legislative power, and exercise of that power, in the area of habeas corpus. Compare, e.g., *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).

*Second*, notwithstanding repeated and sustained efforts to convince Congress to mandate deference by federal courts in habeas corpus to state-court rulings on federal law, Congress has steadfastly adhered to the position that deference by federal courts is due findings of fact but not the application of federal constitutional law to those facts. The legislative histories of the 1948 and 1966 revisions to the habeas corpus statutes are discussed in the briefs of other *amici curiae* and will not be repeated here. In both instances Congress considered, but rejected, proposals to limit the scope of federal-court review of state-court rulings of law. The 1966 Act in particular reflected a deliberate choice by Congress to legislate deference to state-court findings of fact, but *not* to application of constitutional law to those facts. As this Court recognized in *Miller v. Fenton*, 474 U.S. at 111-12 (emphasis added):

The 1966 amendment was an almost verbatim codification of the standards delineated in *Townsend* . . . .

<sup>10</sup> Constitutional scholars agree. See, e.g., Saltzburg, 44 Ohio St.L.J. at 368 (characterizing *Brown* as "the Court's best effort at statutory interpretation"); Monaghan, *The Burger Court and "Our Federalism"*, 43 Law & Contemp. Probs., No. 3, at 44, 49 (1980) (observing that "Congress seems to have codified relatively full federal collateral review of state criminal convictions" and stating that "reexamination must come from Congress rather than from the Court").

When a hearing is not obligatory, *Townsend* held, the federal court "ordinarily should . . . accept the facts as found" in the state proceeding. . . . Congress elevated that exhortation into a mandatory presumption of correctness. *But there is absolutely no indication that it intended to alter Townsend's understanding that the "ultimate constitutional question" of the admissibility of a confession was a "mixed questio[n] of fact and law" subject to plenary federal review.*

*Miller v. Fenton*, a recent 8-1 decision of this Court, also illustrates the *third* salient conclusion about *Brown v. Allen*—i.e., that this Court has faithfully followed its holding that issues of constitutional law, facial or as applied, are for the federal courts' independent, plenary review. See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 546 (1961); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972); *Brewer v. Williams*, 430 U.S. 387, 403-04 (1977); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980); *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981); *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

In view of the extraordinary attention Congress has paid to habeas corpus, particularly in recent decades, and this Court's long string of precedents, it would be a particularly aggressive assumption of judicial power for the Court to reinterpret the 1867 Act today simply because it now questions whether *Brown* was the best interpretation of the 1867 Act or whether the policies of finality and comity would be better served by a different approach. Policy decisions are for Congress—not unelected members of the federal judiciary—and although Congress has long been aware of *Brown*, it has refused to alter it. See *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 325 (1990). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164,

172-173 (1989) (Kennedy, J.); see also *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). As Chief Justice Rehnquist put it just a few weeks ago in *White v. Illinois*, 112 S. Ct. 736, 741 (1992), "the argument presented by the Government comes too late in the day to warrant reexamination of this approach."

## II. *Teague* and Its Progeny Have Preserved Independent Review.

In the face of this history, the Solicitor General is quite candid that the United States and petitioners are asking the Court to overrule a series of its own precedents. Br. at 13. The Solicitor General argues, however, that it is "incongruous" to retain independent federal review for state-court application of law to facts because *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny already require federal courts to defer to state courts' "reasonable, good faith interpretations of law," Br. at 9. Those cases, however, do no such thing.

### A. *Teague* Alters Retroactivity, Not the Standard of Review.

*Teague* and its progeny are cases about retroactivity. They establish that new rules of constitutional law announced after a conviction becomes final should not be applied by federal courts in habeas proceedings. Whether the petitioner is asking for the application of a "new rule" is a threshold question decided *before* the federal court examines the merits of the petitioner's claim.<sup>11</sup> If ruling

<sup>11</sup> The Court's language in *Teague* and subsequently concerning "reasonable, good-faith interpretations of existing precedents made by state courts," *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (quoting *Butler v. McKellar*, 494 U.S. 407, 414 (1990)), relates only to that first, threshold question: determining what the law *was* at the time of the state court decision. But *Teague* and subsequent cases repeatedly insist that whatever the law was at the time, it must be applied correctly and faithfully. See *Teague*, 489 U.S. 306-307; *Butler*, 494 U.S. at 412. In effect, *Teague* simply instructs federal courts to give petitioners no more relief than they could have received had this Court taken the case on direct appeal and applied existing law. See generally Mishkin, Foreword: The High

for the petitioner would require application of a new rule, then habeas corpus review of that claim is not available under *Teague*. But if not—and this point seems to be totally overlooked by the Solicitor General—then the federal court reviews the state court's conclusions (both on "pure" questions of law and on "mixed" questions of law and fact) *de novo*. See *Teague*, 489 U.S. at 306 (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). There is no deference paid to state-court conclusions of constitutional law or applications of the Constitution to facts. As Associate Deputy Attorney General Andrew McBride (a signatory of the Solicitor General's brief) testified in Congress last summer: "Under present law, the *legal* determinations of state courts are entitled to no weight at all in federal habeas corpus proceedings."<sup>12</sup>

This Court has itself proven this point repeatedly since *Teague* was decided. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), for example, the Court determined, "as a threshold matter," *id.* at 313, that granting the petition would not create a "new rule" as that term was defined in *Teague*. The Court then went on to perform an independent, plenary assessment of the record below, see *id.* at 322-326, and independently applied the legal principles to that record. At no point in this analysis did the Court even mention, let alone defer to, the reasoning of the state court below.

Similarly, in *Estelle v. McGuire*, 112 S. Ct. 475 (1991), the Court reviewed *de novo* a state court's conclusion that the admission of certain evidence and a portion of a jury instruction did not violate due process. There was no contention that the petitioner sought a "new rule" under *Teague*: the only issue was whether the state court prop-

Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 86-87 (1965), Hart, *supra*, at 106-09; Wechsler, *Habeas Corpus and the Supreme Court*, 59 U. Colo. L. Rev. 167, 179-80 (1988).

<sup>12</sup> *Habeas Corpus Reform, Hearings before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 102d Cong., 1st Sess. [hereinafter "1991 House Hearings"] (June 27, 1991).

erly applied the established rules. This Court, as well as the lower federal courts, treated that question *de novo*, apparently overlooking the "anomaly" so feared by the Solicitor General.<sup>13</sup>

### B. Independent Review Is Required to Fulfill the Deterrence Stressed in *Teague*

Anything other than independent federal review would be fundamentally at odds with the very purpose of *Teague* and of the Court's recent pronouncements concerning the role of the habeas writ. The Solicitor General is correct when he observes (Br. at 9) that "[t]his Court's recent decisions have emphasized the basic purposes of federal habeas corpus—to ensure that state criminal proceedings are conducted consistently with the Constitution as interpreted at the time of the proceedings, and to deter unconstitutional action on the part of the state courts." As Justice Scalia explained: "Our holding in *Teague* rested upon the historic role of habeas corpus in our system of law, which is to provide a deterrence, the threat of which serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Penry v. Lynaugh*, 492 U.S. at 352 (Scalia, J., dissenting) (internal quotes omitted).<sup>14</sup>

<sup>13</sup> The same is true of *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), where this Court followed *Jackson v. Virginia* in reviewing *de novo* the constitutional sufficiency of the evidence. See also *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Parker v. Dugger*, 111 S. Ct. 731 (1991); *Terrell v. Morris*, 493 U.S. 1 (1989). In none of these post-*Teague* cases has it ever been suggested that federal courts—once they satisfy themselves that they are not being asked to announce or apply a rule of constitutional law that did not exist at the time of the highest state court's judgment—should not apply plenary independent review of state-court applications of constitutional law.

<sup>14</sup> The crucial incentive habeas review creates for state courts to adhere faithfully to uniform federal standards has been stressed even by those members of this Court most concerned about the costs of federal habeas review. As Justice Powell put it, concurring in *Solem v. Stumes*, 465 U.S. at 653 (quoting *Mackey v. United States*, 401 U.S.

There can be no doubt that the rule being considered today would subvert this important goal. *Teague* itself does not significantly detract from the deterrent function since it is hard to convince state courts to adhere faithfully to something "more" than the law as settled on the date of its decisions. Cf. *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982). But if state courts are assured that their applications of the federal constitution will remain undisturbed so long as they are not "unreasonable" or "clearly erroneous," federal habeas corpus will no longer provide an incentive "to toe the constitutional mark." *Solem v. Stumes*, 465 U.S. at 653 (Powell, J., concurring). Accepting the petitioners' and Solicitor General's argument would mean that state courts will no longer need accurately to apply even settled law—so long as they do not stray so far as to manifest "judicial disobedience." Pet. Br. at 19. Nothing in *Teague*, or anywhere else, suggests that it should be acceptable for state courts to do something "less" than correctly apply settled constitutional law.

Moreover, if independent review is abandoned, no mechanism will remain to ensure that the constitutional protections guaranteed to defendants will be applied equally in all jurisdictions. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J. concurring). For if federal habeas review is superficial—merely checking to see if the state court's decision is "reasonable" or whether it articulated the correct legal standard—different levels of constitutional protections will inevitably develop in different states. See, e.g., *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). While the announced standards of constitutional law may be equivalent everywhere, there is no reason to believe that all fifty state court systems will apply those standards

667, 687 (1971) (separate opinion of Harlan, J.): "Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.'" Accord, *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting); *Saffle v. Parks*, 494 U.S. at 488; *Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990); *Butler v. McKellar*, 494 U.S. at 413.

uniformly, as the history of habeas corpus in this country surely proves.

The Supreme Court alone cannot perform this necessary function. This Court's role has properly become one of resolving novel and thorny questions of federal law arising from both the state and federal courts. See Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 69 (1965). This Court simply cannot function as a court of errors to correct misapplications of federal law by the state courts. Indeed, the Court has made clear that mere error in the decision below does not justify granting a writ of certiorari. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.17, at 221 (6th ed. 1986). Since the basic commands of the Bill of Rights were made applicable to state criminal proceedings, that role has always been filled by the lower federal courts. See generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970); Mishkin, *supra*, at 87. The deference being considered today would all but remove the lower federal courts from that role, eviscerating the deterrent effect of federal habeas review.

### C. Independent Federal Review Promotes, Rather Than Diminishes, the Benefits of Federalism.

Federal habeas review of state-court convictions inevitably results in some friction between federal courts and the states. That friction is simply the relatively small price Congress has chosen to pay for the precious safeguard to our liberty provided by the Great Writ. As this Court stated recently in *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)), habeas corpus is a remedy designed to "interpose federal courts between the States and the people, as guardians of the people's federal rights."

Since passage of the 1867 Act, Congress and this Court have implemented doctrines to minimize that friction. E.g.,

28 U.S.C. § 2254(b) (exhaustion doctrine); *id.* § 2254(d) (deference to state-court findings of fact); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (adequate and independent state ground). Thereafter, the principal source of remaining friction was attributable to the fact that federal courts felt free to apply newly announced constitutional rules of criminal procedure to state-court judgments that had correctly applied constitutional precedents as they existed at the time. As this Court explained in *Engle v. Isaac*, 456 U.S. at 128 n.33: "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." See also *Brown v. Allen*, 344 U.S. at 534 (Jackson, J., concurring).

*Teague* has now eliminated this strain. In this regime, it is patronizing and disrespectful to state judges even to suggest that deference is necessary when their decisions will be overturned only if they misapplied the federal law that was applicable at the time the conviction became final. As one state supreme court justice recently testified: "[A]s a state judicial officer, I have absolutely no problem with having the federal courts look over my shoulder in capital cases. In fact, in light of the historical data, I feel compelled to invite their review."<sup>15</sup> Another stated:

To create a standard of deference that renders state courts the final arbiter of [constitutional law] is to ignore their institutional limitations and the need for predictability and uniformity in the federal law. . . . As a state judge, I welcome and rely upon the availability of federal habeas review of criminal cases for a number of reasons.<sup>16</sup>

<sup>15</sup> 1991 House Hearings (May 22, 1991) (statement of Florida Supreme Court Justice Rosemary Barkett).

<sup>16</sup> *Id.* (July 17, 1991) (statement of Utah Supreme Court Justice Christine M. Durham; emphasis omitted). See also *Habeas Corpus Legislation, Hearings before the House Judiciary Subcomm. on Courts, Intellectual Property, and the Administration of Justice*, 101st Cong., 2d Sess. 663-97 (May 24 and June 6, 1990) (statement of Mississippi Supreme Court Justice James L. Robertson).

If state courts are truly co-equals, there is no reason not to overturn their decisions when they were wrong, even if they were only "reasonably wrong."

### III. Plenary Federal Review in Habeas Corpus Plays a Fundamental Role in Enforcing the Bill of Rights.

The role federal habeas corpus has played in enforcing constitutional rights cannot be overstated. Even during the last decade, this Court—unambiguously exercising plenary independent review of the constitutional issues presented—has found it necessary to grant habeas corpus relief to prisoners who were convicted and sentenced to die under a statute that was unconstitutionally vague and overbroad;<sup>17</sup> by a jury from which blacks and women had been intentionally excluded;<sup>18</sup> by a jury instructed that, in passing sentence, it could not consider the defendant's brain damage, his cooperation with the police, and his capacity for rehabilitation;<sup>19</sup> and by a jury instructed that it need not find the defendant guilty beyond a reasonable doubt.<sup>20</sup> The Court has also recently found it necessary to grant the writ to defendants represented by incompetent trial counsel<sup>21</sup> or indicted by grand juries from which blacks and Hispanics were systematically excluded;<sup>22</sup> and to a defendant convicted because he exercised his constitutional right to silence.<sup>23</sup>

Nothing better illustrates the critical need to preserve independent federal court review of the application of con-

<sup>17</sup> *Maynard v. Cartwright*, 486 U.S. 356 (1988).

<sup>18</sup> *Amadeo v. Zant*, 486 U.S. 214 (1988).

<sup>19</sup> *Hitchcock v. Dugger*, 481 U.S. 393 (1987); see also *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Aldridge v. Dugger*, 925 F.2d 1320 (11th Cir. 1991); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991).

<sup>20</sup> *Francis v. Franklin*, 471 U.S. 307 (1985); see also *Reed v. Ross*, 468 U.S. 1 (1984).

<sup>21</sup> *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

<sup>22</sup> *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Castaneda v. Partida*, 430 U.S. 387 (1977).

<sup>23</sup> *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

stitutional law to the facts found by state courts than a study presented last summer to Congress by the ABA. The study analyzed all cases between July 1976 and May 1991 in which state prisoners under sentence of death completed the process of securing habeas corpus review of their judgments of conviction and death sentence.<sup>24</sup> The findings of this comprehensive study must give pause to anyone advocating a reduction in the standard of federal review. Out of the 361 decisions during this period which resulted in published opinions by the federal courts of appeals, the federal courts found constitutional violations of a magnitude requiring reversal in 145 instances. This is a constitutional error rate of *forty* percent.<sup>25</sup> Reviewing *all* documented cases (*i.e.*, final decisions from all federal courts, regardless of whether a full opinion was written), the constitutional error rate was *forty-six* percent (186 out of 407 capital judgments). In other words, in over four out of every ten capital cases in which the state courts, upon direct and collateral review, have found no constitutional error, the federal courts, according full deference under 28 U.S.C. § 2254(d) to state-court findings of fact, have concluded that constitutional error compelled issuance of the writ.

In each of these reported cases, federal review was preceded by a full state-court review on the merits of the constitutional claims.<sup>26</sup> The vast majority involved not pure questions of constitutional law, but rather the application of that law to the facts as found in the state courts. In many cases the state courts issued lengthy published opin-

<sup>24</sup> 1991 House Hearings (July 17, 1991) (Appendix to Statement of John Curtin, Jr.).

<sup>25</sup> This figure does not even include the many instances in which constitutional error was found but determined not to require reversal under *Chapman v. California*, 386 U.S. 18 (1967). A separate study by *amicus* Criminal Justice Legal Foundation found a reversible-error rate of 39.4 percent. See H.R. Rep. No. 242 (Part 1), 102d Cong., 1st Sess. 124 (1991).

<sup>26</sup> Otherwise, under the doctrines of exhaustion and procedural default, federal courts would not have considered the claims.

ions. Yet in applying settled constitutional law they were very frequently *wrong*—even where the defendant's life was at stake.<sup>27</sup>

It may very well be that some of these cases would have been reversed by federal courts even under a deferential standard of review. But can this Court say with assurance that all, or even almost all, of the constitutional errors by state courts will be remedied by federal courts which defer to a state court's application of the constitution to the facts presented? Surely not. And that, *amicus* respectfully suggests, is the very crux of the matter. As striking as the current statistics are, the issue is not really whether the rate of constitutional error is forty percent or twenty percent or even five percent. In 1952, when *Brown v. Allen* was decided, only 1.8% of habeas petitions presented to federal courts during the prior seven years had been granted. Yet, the Court explained (*id.* at 498): "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities." As lawyers and judges, we can never achieve perfect justice. But "surely", as Justice

<sup>27</sup> Of course it may be argued that in some of these 186 cases, the federal courts were "wrong" while the state courts were "right". "Whenever decisions of one court are reviewed by another, a percentage of them are reversed, and reversals alone are 'not proof that justice is thereby better done.'" *Brown v. Allen*, 344 U.S. at 540 (Jackson, J., concurring). But as state judges are frank to acknowledge, *see, e.g.*, p. 25 *supra*, state courts frequently lack the resources, expertise, and often the independence that comes with life tenure, which the federal judiciary enjoys. Moreover, even assuming state courts are correct just as often as federal courts, it therefore follows that state courts overlook reversible constitutional error not 46% but "only" 23% of the time. And if one round of plenary federal review means granting habeas relief to some defendants who do not "deserve" it, that is consistent with one of the most basic principles of our justice system: that it is better for a guilty person to be set free (or more accurately, to be retried or resentenced), than for an innocent man to be unjustly imprisoned (much less executed). *See, e.g.*, Mishkin, *supra*, at 80-81; J. Frank & B. Frank, *Not Guilty*, 11-12 (1957).

Frankfurter stated in *Brown*, 344 U.S. at 498-99:

it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.

#### IV. Federal Judges Should Not Be Directed To Affirm Applications of Settled Constitutional Law They Conclude Are Incorrect.

How, then, are federal judges to adjudicate the habeas corpus petitions that have so often in the past revealed serious constitutional error? Federal judges are sworn to uphold the Constitution, 28 U.S.C. § 453, and mandated by Congress to "entertain an application for a writ of habeas corpus" from, and to "forthwith award" the writ to, any state prisoner "in custody in violation of the Constitution." If henceforth they are not to review the application of settled constitutional principles in a plenary, independent fashion, how can they uphold their oaths and satisfy their statutory mandate? Deference to state fact-finding is one thing: it has been mandated by Congress, it is embedded in our jurisprudence, and it leaves federal judges free to uphold the Constitution against those facts. But deference to state-court conclusions as to the correct application of constitutional law means inevitably that some state-court decisions on constitutional law that would otherwise be vacated as incorrect would be affirmed. Affirmance of a constitutional decision that is "reasonable," but wrong, cannot be squared either with the judge's oath or with Congress' mandate.

Requiring deference to state-court applications of constitutional law would thrust federal judges into a role unknown to them for more than 180 years. In no other context have federal judges ever been told to subordinate

their opinions about the proper application of the Constitution to the determinations of any other body. The role of federal courts as the final authority on federal constitutional law has long been unquestioned. Indeed, requiring federal judges to accept rulings they conclude have wrongly applied the Constitution is more damaging to the rule of law than eliminating substantive review altogether where the state court has conducted a "full and fair hearing." In that sort of system (which Congress has twice rejected and which the ABA strongly opposes), while incorrect rulings would escape review, at least a federal judge would not be asked to place his or her imprimatur on them.

### CONCLUSION

For the foregoing reasons, this Court should reaffirm that in considering a petition for a writ of habeas corpus by a person in state custody, a federal court must exercise plenary, independent review of the state court's application of federal constitutional law to the facts.

Respectfully submitted,

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